EXTENT OF REGULATION OF OCEAN AND INLAND WATER TRANSPORTATION BY THE FEDERAL GOVERNMENT

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In the past the federal regulation of transportation agencies has been concerned much more largely with railroads than with other common carriers. Gradually, however, as it became evident that the need for such regulation is not peculiar to railroads, the scope of the interstate commerce law was extended so as to include express, sleeping car and private car companies, fast freight lines, industrial railroads, refrigeration and ventilation services, terminal facilities, elevators, transfer and delivery services, and all transportation agencies operated in connection with the interstate shipment of freight or passengers by rail. The interstate business of pipe lines, electric street railways, and telephone, telegraph and cable lines were likewise placed within the scope of the interstate commerce act, and, as will be hereafter described, water transportation agencies were under certain conditions subjected to the provisions of the statute. So limited, however, is the control of the Interstate Commerce Commission over water carriers that the enactment of additional legislation applicable to their charges and public services is now being seriously considered.

The relations between carriers by water and between such carriers and railways has also become a matter of public interest. The Sherman act of 1890 and the anti-trust provisions of the tariff act of 1894 are generally applicable to all combinations, conferences or agreements which unreasonably restrain interstate or foreign trade, and the Panama Canal act of 1912 regulates certain phases of such relations, but the need of federal legislation particularly applicable to steamship combinations, conferences or agreements is a topic of serious consideration.

Existing federal regulation of ocean and inland water transportation may conveniently be classified into (1) navigation laws

concerning the public safety, registry and enrollment, treatment of crews and a multitude of matters not directly connected with transportation charges and services; (2) statutes regulating the charges and public services of water transportation agencies; and (3) statutes regulating or prohibiting combinations, conferences or agreements.

GENERAL NAVIGATION LAWS

Since it is with the type of regulation included in (2) and (3) above that this volume is especially concerned, it is not the purpose of this paper to present a detailed analysis of the many navigation laws which Congress has from time to time enacted. Brief mention of the principal groups of statutes will, however, serve to emphasize the line of demarcation which Congress has in the past drawn between water and rail transportation. Both rail and water carriers have been the subject of much legislation, but for the most part, although not entirely, in separate statutes and with different objects in view. The principal federal laws regulating the railroads are those concerning their charges and public services, while the principal laws concerning water transportation are the various general navigation statutes. The public safety has been regulated in the case of both rail and water transportation, but the conditions of operation have differed so widely that separate statutes were enacted. Mention of some of the many navigation laws which are now in effect will also serve to emphasize that, in matters other than charges and public services, water transportation is regulated by a multitude of federal statutes.

Navigation Statutes.—An important group of navigation laws are those which require American vessels, excepting harbor craft and vessels not propelled by sails or internal motive power of their own, to be *registered, enrolled or licensed.* Vessels so documented with the United States Commissioner of Navigation are identified by an official name and number permanently carved or marked on the vessel as required by law, and each registered vessel in addition has her draught officially marked on the stem and stern post. These statutes, moreover, specify what vessels may and may not be documented. Since 1817 foreign built vessels have been barred from the American coastwise business, and it is therefore important for vessels equipped with

sails or engines to be properly enrolled or licensed. Until 1912, likewise, foreign built vessels were barred from American registry. On August 24 of that year free shipping was applied in the foreign trade to the extent that foreign vessels not over five years of age and wholly owned by citizens of the United States or by domestic corporations, the president and managing directors of which are American citizens, were permitted to register under the American flag. When so registered, foreign built vessels are subject to all the navigation laws applicable to American vessels engaged in the foreign trade, and to all the privileges of American registry, except that of engaging in coastwise navigation.

Similar to the laws providing for the documenting of vessels, are those requiring the *measurement of documented vessels.* Every registered, enrolled, or licensed vessel of the United States must be measured in accordance with the official rules enacted by Congress and enforced by the Commissioner of Navigation. Each documented vessel is required to carry a measurement certificate showing her official length, breadth and depth, her gross and net tonnage, and other particulars descriptive of her identity. Foreign vessels entering American ports are, likewise, required to be so measured unless the measurement laws of their home country are accepted by the Secretary of Commerce as being substantially the same as those of the United States. The requirements regarding measurement are particularly important because the tonnage taxes of the United States and other countries as well as numerous private commercial charges are based upon the net register tonnage of vessels. All vessels navigating the Panama Canal, moreover, are required to be measured in accordance with the measurement rules promulgated by the President of United States on November 21, 1913, and all tolls collected at the Panama Canal are based upon their net tonnage so ascertained.

The *tonnage tax laws* constitute another group of navigation statutes. As amended on August 5, 1909, every vessel, American and foreign, entering from any foreign port in North or Central America, the West Indies, the Bahamas, the Bermudas, or Carribbean coast of South America is required to pay 2 cents per net register ton not exceeding a total of 10 cents per ton annually, and every vessel entering from any other foreign port is required to pay a tonnage tax of 6 cents per net ton not exceeding 30 cents per

ton annually. By an act of March 8, 1910, those entering otherwise than by sea from a foreign port at which no tonnage taxes, light house dues or other equivalent taxes are imposed on American vessels, are exempt from tonnage taxes at American ports; and all vessels engaged in coastwise or inland navigation have for many years been similarly exempted. Numerous statutes contain provisions for retaliation in case discriminating taxes are levied on American vessels or wares by any foreign country, and in accordance with the acts of 1815 and 1828, treaties providing for shipping reciprocity have been negotiated with a large number of foreign countries. The United States has since 1828 consistently adhered to the policy of shipping reciprocity alike for vessels and their cargoes, until the enactment of the tariff law of October 3, 1913, which provides "that a discount of 5 per cent on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration within the laws of the United States: *Provided,* that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." This clause, which applies only to countries with which the United States does not have shipping reciprocity treaties, is a step in the direction of the policy of shipping protection which prevailed during the years 1789 to 1815.

Many navigation laws regarding the *treatment of crews* on American vessels have been enacted by Congress. There are statutes concerning the payment of wages, the attachment of wages and clothing, the punishment for disobedience and mutiny, the keeping of a log book, the shipping of crews before shipping commissioners and consuls, the signing of shipping agreements, the scale of provisions, the depositing of a crew list, the minimum space per man assigned as crew's quarters, the heating, ventilation, etc., of crew's space, and the use of force, misrepresentations and other illegal methods in the shipping of crews. There are statutes which regulate the return of seamen who have deserted from American vessels in American ports, and numerous treaties which regulate desertion from American vessels in foreign countries and from foreign vessels in the United States. Several bills concerning the treatment of seamen on American vessels and the practice in case of desertion are now being considered by Congress.

Various navigation laws regulate the *manning of American vessels.* There are statutes requiring the licensing of officers, and establishing the method of obtaining a license; some requiring the master and all watch officers, including pilots, to be citizens of the United States; and others providing that the employment of licensed officers and crew of American vessels subject to the inspection laws of the United States shall be determined by local inspection officials. Various bills now before Congress would materially alter the requirements regarding the manning of American vessels if the bills were enacted into law.

Many statutes regulate the *seaworthiness and inspection* of vessels. There are detailed provisions relating to the inspection of American steamers and also other American vessels carrying passengers, their equipment with life saving appliances, permanent stairways, wire tiller ropes and fire fighting appliances, and the carriage of inflammable or explosive cargoes. Some of the requirements regarding inspection apply also to foreign passenger steamers unless the inspection laws of their home country approximate those of the United States. Severe penalties are provided for knowingly sending out unseaworthy vessels.

There are statutes which further promote the public safety by establishing rules for the *prevention of collisions*, and legally applying the *international rules of the road* to American sea-going vessels. Indeed the general rules of ocean navigation are established by international treaty as well as by statute. Conventions embodying revised rules to govern ocean navigation, wireless telegraphy, safe construction of sea-going vessels and other matters concerning safety of life at sea are now pending in the Senate of the United States and before the governments of the several foreign countries whose representatives recently (November 12, 1913–Jan. 20, 1914) met in international conference. In 1910 and 1912 Congress enacted important laws prohibiting American as well as foreign passenger vessels carrying more than fifty persons from leaving an American port without being fitted with the required *wireless telegraph apparatus* and the required number of operators, and subjecting the use of radio communication on land as well as on sea to a code of much needed regulations. The United States is likewise party to an international convention of 1912 regarding the use of wireless telegraphy.

Other important federal navigation laws which in various ways regulate water transportation are those regulating the *entry and*

clearance of vessels, the *boarding and search* of vessels by properly authorized government officials, the *entry of imported merchandise*, the *documents* which must be carried and presented, *quarantine and bills of health*, the inspection, entry and deportation of *immigrants*, the *ocean mail service* under the mail contract act of 1891, the traffic in *special cargoes* such as livestock, adulterated products and opium, the establishment of *anchorage grounds*, the placing of *obstructions to navigation*, the *trial and punishment of crimes* committed upon the high seas or waters within the jurisdiction of the United States or of any particular state, the punishment of *piracy*, the *liability* of owners, masters and shippers, the duty of rendering *assistance to vessels* in distress and the right to remuneration for *salvage services*.

Regulation by Executive Departments.—Many of the executive departments and bureaus of the government are concerned with the regulation of shipping. In the Department of Commerce are the bureau of navigation which is entrusted with the documenting of American vessels and the general enforcement of the navigation laws; the shipping commissioners appointed at the various ports of entry to supervise the shipping and discharge of seamen on American vessels; the bureau of corporations which has investigated and reported on "Transportation by Water;" and the steamboat-inspection service. In the Treasury Department are the customs service which has charge of the entry and clearance of vessels, the collection of duties and tonnage taxes, the survey and inspection of cargoes, the measurement of vessels, and the bonding of imported wares; the revenue cutter service which coöperates with the customs service in the boarding of vessels, the collection and security of revenue and the enforcement of the customs regulations; the Alaska seal agents who supervise the Alaskan seal fisheries; and the public health and marine hospital service. The Department of State negotiates treaties of commerce and navigation, and contains the consular service which serves as well as regulates American vessels and their crews in foreign ports. In the Department of Labor is the bureau of immigration which is in charge of the entry or rejection of immigrants and the administration of the immigration laws, and which supervises the arrangements which the rail and ocean carriers have made for the through transportation of immigrants to interior destinations. The Department of Agriculture regulates and

supervises the exportation and importation of livestock, meats, dairy products, and jointly with the Treasury Department applies the laws prohibiting the importation and exportation of adulterated or misbranded foods or drugs. The War Department establishes harbor lines beyond which no piers, wharves or bulkheads may be extended, and administers the laws prohibiting the obstruction of navigation. Officers of the Navy Department are assigned to numerous ports of entry to coöperate with the port collectors, and the commanding officer of a fleet may act as consul on the high seas and at foreign ports where there is no resident consul. The Navy Department likewise inspects vessels of the first three classes operating under the mail contract act of 1891, and jointly with the War Department is entrusted with the enforcement of the laws and treaties of neutrality. The Post Office Department regulates the ocean mail service, and the Department of Justice is concerned with the enforcement of laws applicable to water transportation. There are various additional executive bureaus which primarily aid rather than regulate navigation.

Regulation by Other Federal Authorities.—In addition to the executive departments of the government there are the federal courts before which those who violate the navigation laws may be brought for trial, and which interpret these laws. As will be seen later, the Interstate Commerce Commission has jurisdiction over water transportation under certain conditions. The United States Congress of course enacts the federal statutes which regulate water transportation, ratifies treaties which directly or indirectly affect ocean carriers, and through its committees holds hearings and conducts investigations.

FEDERAL REGULATION OF CHARGES AND PUBLIC SERVICE

While the charges and public services of carriers engaged in water transportation have not been subjected to federal control to the extent that those of the railroads have been, such regulation is not entirely lacking. Some of the general navigation laws mentioned above directly or indirectly regulate certain phases of the public service of water carriers, particularly those concerning the inspection of steamers, the seaworthiness of vessels, quarantine and bills of health, the carriage of livestock, dairy products, adulterated products, inflammable articles and explosives, and those requiring

vessels to be fitted with prescribed life saving devices. These statutes however are primarily concerned with the public safety, health and similar matters, which resemble more the railway safety appliance acts than the kinds of control exercised over railways through the interstate commerce act.

The Passenger Act of 1882 as Amended.—One phase of the public service of ocean carriers which has been subjected to federal control is their steerage passenger traffic. The so-called "passenger act of 1882" as amended to date regulates the maximum number of steerage passengers which may be carried and tends to safeguard reasonable accommodations by prescribing the minimum space per passenger which may not be exceeded on the various steerage decks. It regulates light and air, provisions, medical attention, discipline and cleanliness, the privacy of passengers, the carriage of explosives and cattle on vessels carrying steerage passengers, the carriage of cargo or stores on steerage decks, the keeping of a passenger list, and the payment of fees to the collector of customs in case of the death of steerage passengers. It also provides for an inspection, under the direction of the United States customs collectors of all vessels carrying steerage passengers, with a view to administering effectively the provisions of the passenger act.

The Immigration Laws.—The steerage passenger traffic of ocean carriers is further regulated by those provisions of the immigration laws which prohibit the handling of the excluded classes of immigrants, the illegal landing of any alien passengers, and the illegal solicitation or encouragement of the immigration of aliens into the United States. The immigration laws also contain provisions requiring ocean carriers to deport all aliens brought to the United States in violation of the law, and requiring them to pay a head tax of four dollars for every alien, with certain exemptions, brought to the United States by them. As was stated above, the immigrant service supervises the arrrangements which the ocean and rail carriers have made at New York for the through transportation of immigrants to interior destinations.

The Interstate Commerce Act as Amended.—The principal federal statute regulating the charges and public services of water

carriers is the interstate commerce act as amended. This act, however, which is so highly important in the control of rail and other forms of interstate land transportation, applies to interstate water transportation only under certain conditions and only in certain respects. Water carriers were brought within the scope of the act in 1906 when section 1 was amended so as to include "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or wholly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) from one state or territory of the United States or the District of Columbia to any other state, etc." Section 6 and 15 define the powers of the commission over such rail-water traffic, but this provision of section 1 is of fundamental importance.

In interpreting this section the Interstate Commerce Commission has ruled that it applies only to such water shipments as are made partly by railroad and partly by water when both are under a common control, management, or arrangement for a continuous carriage or shipment and that it *does not apply to the port-to-port business of water carriers.* The commission has expressly ruled in opinion No. 787 (in the matter of jurisdiction over water carriers, 15 I. C. C. Reps. 208–211, Jan. 7, 1909) as follows:

> The language of the provision in question indicates its meaning. The Act applies to any common carrier or carriers engaged in transportation partly by rail and partly by water *when* both are used under a common control, management or arrangement for *a* continuous carriage or shipment. The use of the word "when" is significant and its natural meaning seems to be that a water carrier is subject to the act "in so far as" or "to such extent as" it carries traffic under a common control, management or arrangement with a railroad. It need hardly be stated that the Act does not require publication of or adherence to rates upon purely intrastate traffic. With regard then to the history and purpose of the enactment, the language used, and the rules of statutory construction which have been mentioned, it is difficult to see how serious doubt can arise that Congress did not intend to regulate the charges exacted upon the port-to-port business of water carriers. . . . . It seems clear that the port-to-port business of water carriers is not within the purview of the statute. This construction gives workable effect to every provision of the act and is in harmony with its remedial purposes. It controls the all-rail and the part-rail and part-water transportation which is the subject of "common arrangement" and leaves all other water carriage open to free competition. Upon further consideration we are constrained to adopt

the view that water carriers are subject to the law only as to such traffic as is transported under a common control, management or arrangement with a rail carrier and that as to traffic not so transported they are exempt from its provisions.

This interpretation was strengthened in 1910 when it was stated in section 15 that "the commission shall not have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water."

There is no all inclusive general definition of what relations or practices constitute or are evidence of common control, management or arrangement, i.e., what constitutes through rail-water transportation, but numerous decisions have been rendered by the commission and the courts in particular instances when a through bill of lading has been issued, when a contract or understanding of any kind involving through transportation has been made, when joint rates are quoted, or when rate divisions are agreed upon by the rail and water carriers. The application of the interstate commerce act to domestic shipments by rail and water under such conditions is clear. But it has repeatedly been ruled by the United States Supreme Court in recent decisions that the application of the interstate commerce act is not dependent upon the issue of a through bill of lading or other specific evidence of that kind. The Supreme Court has ruled that it is the character of the service and not the manner of billing which determines whether commerce is intrastate or interstate, local or through, and whether it is conducted by rail or partly by rail and partly by water under a through arrangement. Some of the cases applicable are: Southern Pacific Terminal Company *vs.* I. C. C., 219 U. S. 498, Feb. 20, 1911; Railroad Commission of Ohio *vs.* Worthington, 225 U. S. 101, May 27, 1912; U. S. *vs.* Union Stock Yards Co., 226 U. S. 286, 1912; Texas and New Orleans Railroad Co. *vs.* Sabine Tram Co., 227 U. S. 111, Jan. 27, 1913; and Louisiana Railroad Commission *vs.* Texas and Pacific Railway Co., 229 U. S. 336, June 10, 1913.

Commission's Power over Accounts and Statistics.—While the commission has no power to regulate the port-to-port business of water carriers it has been ruled by the commission and the

Supreme Court that one section of the act to regulate commerce applies not only to the interstate business of water carriers which they handle in connection with railroads, but to their entire business. The section referred to is section 20 which empowers the commission to prescribe *uniform systems of accounts and* call for *statistical reports.* The Supreme Court has ruled that whenever the water carrier becomes subject to the interstate commerce act as regards a portion of its business the commission may prescribe the methods of keeping the accounts of the company's entire business, and may require statistical reports covering its entire operations. The court expressly ruled that in so doing the commission is not regulating the port-to-port business of water carriers, but is taking the necessary steps properly to regulate that portion of their interstate business which is handled in connection with railroads. In the words of Justice Day in Goodrich Transit Co. *vs.* Interstate Commerce Commission, 224 U. S. 194, April 1, 1912:

> If the Commission is to successfully perform its duties in respect to reasonable rates, undue discrimination and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see, and concerning which it can require no information. . . . . The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of corporations subject to the Act that it may properly regulate such matters as are really within its jurisdiction . . . . Carriers partly by land and partly by water may be required to keep accounts of all their traffic both interstate and intrastate under the provisions of Section 21.

Commission's Power to Establish Through Routes and Joint Rates.—The interstate commerce act confers upon the commission the power to *establish through routes and joint rates* in the case of interstate shipments made partly by rail and partly by water. Prior to the amendment of 1910 it could exercise this important power only if the carriers failed voluntarily to establish any through routes whatever between two points which warranted such action. Since but one through route voluntarily established by the carriers satisfied the requirements of the law, the commission's jurisdiction over water transportation was greatly restricted. The Mann-Elkins amendment of 1910, however, remedied this defect somewhat by stating that:

The Commission may also, after hearing, on a complaint or on its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through route shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classification or joint rates; and this provision shall apply when one of the connecting carriers is a water line.

This amendment gives the commission the power to establish additional through routes even though one has been voluntarily established by the carriers. In Flour City Steamship Co. et al. *vs.* Lehigh Valley R. R. Co. et al., 24 I. C. C. Reps. 179, June 4, 1912, the commission held that:

Prior to 1910 our power to establish through routes was limited to instances in which no satisfactory through route existed. The elimination of this limitation placed within the discretion of this Commission the establishment of additional through routes. In the exercise of this discretion the existence of through routes capable of adequately and expeditiously handling all traffic offered is entitled to much consideration, but no longer constitutes a barrier to another through route. The lower charge proposed to be made by the new route we leave for consideration when we come to fix the joint rate. All we here hold is that it is within the power of this Commission to establish an additional route in connection with the complainant steamship company, provided that company is such a common carrier as is contemplated by the law.

This view concerning the commission's power to establish additional through routes was supported by the United States Commerce Court in Crane Iron Works *vs.* United States (I. C. C. et al. Interveners) 209 Fed. Rep. 238, June 7, 1912. The court held that, subject to the conditions imposed in the act, the establishment of additional routes and the prescribing of joint rates are discretionary with the commission.

There are, moreover, various instances since the amendment of 1910 was adopted in which the commission established through rail and water routes to given points because the carriers had voluntarily established such routes to certain other competitive points. It was held that failure to treat competitive points and shippers alike in this matter constituted undue discrimination. Similarly, it has held it to be an undue discrimination for a railroad to establish through

connections with one water carrier and refuse to do so with others operating under similar conditions. In United States *vs.* Pacific and Arctic Ry. and Navigation Co. et al., 228 U. S., 87, April 7, 1913, the Supreme Court pointed out that the establishment of through connections with some water carriers and the refusal to do so with others may result in a monopoly or combination in unreasonable restraint of trade and be illegal under the Sherman anti-trust law.

The power of the Interstate Commerce Commission to establish additional through routes is not, however, dependent solely upon the amendment of 1910, for section 11 of the Panama Canal act of 1912, amended section 6 of the interstate commerce law which deals with the issue, filing and publication of through rates including rates over rail and water routes, by adding the following provisions:

> When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers both by rail and by water which may or do engage in the same in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce as amended June 18, 1910:
>
> (b) To establish through routes and maximum joint rates between and over such rail and water lines and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.
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> (c) To establish maximum proportional rates by rail to and from ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port, and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

This amendment renders complete the power of the commission over through interstate rail-water traffic, and it provides that whenever any interstate traffic is handled partly by rail and partly by water the commission may establish a through route and maximum joint rates over such rail and water carriers. By connecting with each other in the transportation of interstate traffic, rail and water carriers automatically place themselves within the jurisdiction of the commission as regards the establishment of through routes and maximum joint rates.

The application of these amended clauses to rail-water traffic other than that moving through the Panama Canal has been questioned, the contention being that the words "or otherwise" relate to the phrase "by rail and water" and not to the phrase "through the Panama Canal." This contention has, however, been rejected by the commission and indeed it is clear that the disputed words if related to the former phrase can have no meaning whatever. Each of the clauses following the paragraph which contains the phrase "by rail and water through the Panama Canal or otherwise" deals exclusively with traffic handled partly by rail and water. Moreover, the words "through the Panama Canal or otherwise" appear again in clause (d) of this amendment (see p. 35) and are there used in such a way that their meaning and intent are unquestionable. The Interstate Commerce Commission in Augusta and Savannah Steamboat Company *vs.* Ocean Steamship Co. of Savannah et al., 26 I. C. C. Reps. 384, March 10, 1913, interpreted section 11 of the Panama Canal act as follows:

> But our jurisdiction does not rest upon the above ground solely (the amendment of 1910). Since the filing of this petition, by the Panama Canal Act, so-called, approved August 24, 1912, this body has been given additional jurisdiction over water carriers. The 11th section of the Act amends Section 6 of the Act to regulate commerce as follows: . . . . If the above amendment applies to the traffic in question the right of the Commission to establish this through route is clear. The defendants contend that it does not apply for the reason that this amendment relates to traffic which passes through the Panama Canal. They argue that the words "or otherwise" modify the phrase "by rail and water" and not the phrase "through the Panama Canal," but the plain everyday reading of the Act is "through the Panama Canal or otherwise" and the defendants have referred us to no cannon of construction nor to any reason for disregarding the obvious meaning of those words. Indeed, a consideration of the situation to which the amendment applies would seem to conclusively demonstrate that the position of the defendants is incorrect since the words "or otherwise" are pure surplusage if read as the defendants say they should be. Traffic through the Panama Canal can only move by rail and water unless it moves from port-to-port, and in that case we have no jurisdiction. We hold, therefore, that the Commission has the jurisdiction to establish the through routes and the joint rates prayed for.

In Truckers Transfer Company *vs.* Charleston and Western Carolina R. R. Co., 27 I. C. C. Reps. 275, June 5, 1913, the commission reiterated its discretionary power over the establishment of joint rail-water rates and ruled as stated in the syllabus that:

When boat lines have met all reasonable requirements of connecting railroads with respect to security for freight charges, adequacy of service, efficiency of management, and any other guarantee which may justly or lawfully be required, they should be permitted to establish through routes and publish joint rates with their connecting railways.

Commission's Power to Order Physical Connections.—The Interstate Commerce Commission not only may establish through rail-water routes and joint rates when interstate freight is handled partly by rail and partly by water, but it may, when considerations of practicability, public safety and volume of traffic warrant, order the *establishing of physical connection* between rail and water carriers. Section 11, clause (a) of the Panama Canal act granted to the commission the power:

to establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its lines and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier individually, or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply when such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay. The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks when constructed shall be operated, and it may either in the construction or the operation of such tracks determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other carriers than the carriers involved.

It is probable that the exercise of this power may have an important bearing upon the future of coastwise and inland water transportation.

Commission's Powers over Rate Divisions.—The Interstate Commerce Commission has the power to *make rate divisions* between rail and water carriers which operate over a through route. The clause of section 15 of the interstate commerce act as amended in 1910, quoted on p. 28 above, expressly specifies that the commission may "prescribe the division of such through rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated. . . . ." The amendment contained in the Panama Canal act again provides that

in case of through routes and joint rates the commission may "determine all the terms and conditions under which such lines shall be operated in the handling of the through traffic embraced."

Commission's Powers over Through Bills of Lading.—The commission also has the power to *order the issuance of through bills of lading* in interstate rail-water traffic. The clauses of the interstate commerce act, as amended in 1910 and 1912, which are quoted in the preceding paragraph, include bills of lading as well as other terms and conditions of traffic. Another provision of section 15, however, expressly requires the issuance of a through bill of lading by providing that, subject to reasonable exceptions, a shipper may designate in writing over which one of two or more through routes he desires to ship his freight. The section referred to specifies that:

> It shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to the connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading.

In practice the commission has at various times required the issue of through rail-water bills of lading. Instances are the Augusta and Savannah Steamboat Company and the Flour City Steamboat Company cases, previously cited. In Gulf Coast Navigation Co. *vs.* Kansas City Southern Ry. Co. et al., 19 I. C. C. Reps. 544, Nov. 14, 1910, the commission has, however, denied that a water carrier owned by a shipper is entitled to through routes, joint rates, and through bills of lading, even though incorporated as a common carrier.

Commission's Powers over Water Terminals.—Water terminal facilities operated in connection with interstate shipments made partly by rail and partly by water are brought within the scope of the interstate commerce act by section 1, and the commission has at various times exercised its jurisdiction over such terminals. In Southern Pacific Terminal Company *vs.* I. C. C. 219 U. S. 498, Feb. 20, 1910, the Supreme Court ruled that the Interstate

Commerce Commission has jurisdiction to regulate the charges of a terminal company which is part of a railroad and steamship system and operates terminals, such as those of the Southern Pacific Terminal Co. at Galveston. In Mobile Chamber of Commerce et al *vs.* Mobile and Ohio R. R. Co. et al., 23 I. C. C. Reps. 407, May 7, 1912, the commission prohibited future discrimination in water terminal facilities at Mobile. It ruled that:

> There can be no such thing as a terminal which is not a public terminal—a rate charged which only applies to certain favored connections unless a like rate is made to some other dock or facility where a like service is rendered. . . . . The defendant carriers must make their wharves available to the ships to which the shipments are destined on the rate they charge for shipside delivery, and they may do this at any wharf there reserving their own docks for certain lines of ships and giving delivery at whatever other docks they choose.

Commission's Powers over Ferries.—Section 1 of the interstate commerce act also places within the scope of the act all *ferries* operated in connection with interstate rail-water traffic. In New York Central and Hudson River Ry. Co. *vs.* Board of Chosen Freeholders of the County of Hudson, 248 U. S. 248, Feb. 24, 1913, the Supreme Court ruled, as stated in the syllabus, as follows:

> Congress by passing the Act to regulate commerce has taken control of interstate railroads and having expressly included ferries used in connection therewith has destroyed the power of the state to regulate such ferries. The operation at one time of both the power of Congress and that of the state over a matter of interstate commerce is inconceivable. The execution of the greater power takes possession of the field and leaves nothing upon which the lesser power can operate.

Blanket Provision of Commerce Act.—The above statement indicates the manner in which the Interstate Commerce Commission has exercised its power over rail-water transportation, the specific provisions of the interstate commerce act as amended, and their interpretation by the courts and the commission. The act as amended in 1910 and 1912 provides, however, that the commission may determine "*all the terms and conditions*" under which through rail-water routes shall be operated and under which any interstate traffic carried partly by rail and partly by water shall be handled. The full scope of these provisions has not been

interpreted either by the commission or the Supreme Court. It is probable that they give to the commission full control over any interstate "property" which "may be or is transported from point to point in the United States by rail and water. . . . ."

Commission's Powers over Railroad-Owned Water Carriers.—With the exception of section 20 concerning accounts and statistics the interstate commerce act at present applies only to such interstate water transportation as is conducted partly by rail and partly by water, the port-to-port business of water carriers being purposely excluded from the scope of the act. Section 11 of the Panama Canal act, however, in amending the interstate commerce act as regards the ownership or control of competitive or potentially competitive water carriers by railroads, contains a clause which provides for the *future regulation of the port-to-port* as well as the rail-water *traffic of railroad-owned or controlled water carriers.* The act prohibits the future ownership or control after July 1, 1914 by railroads engaged in interstate commerce of water carriers which compete or may compete with such railroads; but provides that the commission may permit the railroads to own or control water carriers other than those navigating the Panama Canal, if such service by water "is operated in the interests of the public and is of advantage to the convenience and commerce of the people, and if such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration." It then provides: "in every case of such extension of rates the schedules and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation."

Commission's Powers over Ocean Carriers Engaged in Foreign Trade.—The provisions of the interstate commerce act, as amended in 1906, concerning the charges and public services of *ocean carriers engaged in the foreign trade* is contained in section 1, which provides that the act applies

to any common carrier or carriers engaged in the transportation of passengers or property wholly by rail (or partly by rail and partly by water when both

are used under a common control, management or arrangement for a continuous carriage or shipment) from one state or territory of the United States, or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipment from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

An additional provision applicable to the foreign trade was added in 1912, the Panama Canal act (section 11, paragraph "d") providing that, "if any rail carrier subject to the act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country through the Panama Canal or otherwise for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

In Cosmopolitan Shipping Co. *vs.* Hamburg-American Packet Co. et al., 13 I. C. C. Reps. 266, Mar. 9, 1908, the Interstate Commerce Commission expressly pointed out that its powers over ocean carriers engaged in the trade with non-contiguous foreign countries are intentionally different from those which it possesses with respect to interstate commerce. The act applies to trade conducted partly by rail and partly by water, "from any place in the United States to any adjacent foreign country" and "from any place in the United States through a foreign country to any other place in the United States." But the commission has no jurisdiction over the charges or services of the ocean carrier in case of shipments to or from oversea countries. In case of such shipments the act applies only to the railroad or inland portion of the export or import charges or services, i.e., it applies only to such shipments as are carried "from such place (in the United States) to a port of trans-shipment" or "to such place from a port of entry either in the United States or an adjacent country." The commission denied that the issue of a through rail-water bill of lading places the ocean carrier within its

jurisdiction or that it has any control over ocean pools. It claimed full authority over the rail portion of the import and export rates, but disclaimed any authority over the rates or practices of ocean carriers engaged in trade with non-contiguous foreign countries.

In later decisions the commission has repeatedly denied any power to establish through routes, joint rates and through bills of lading between railroads and ocean carriers engaged in the over-sea trade. By confining itself to the rail carriers it has, however, at various times, effectively prevented undue discrimination in the foreign trade. In Aransas Pass Channel and Dock Company *vs.* G. H. and S. A. Railway Co. 27 I. C. C. Reps. 415, June 16, 1913, for example, it held that

> this Commission has no more power to require the issuance of through bills of lading to foreign destination than it has to establish through routes or rates to such destinations, but it does have power to remove unjust discriminations and may require the discontinuance of practices which create such discriminations. In our opinion it is unjustly discriminatory to refuse to issue through export bills on cotton exported through Port Aransas, Texas, while issuing them through Galveston or other Texan ports to which cotton is carried by defendants or in the transportation of which they participate. Defendants may waive the collection of the under charges on the past shipments of cotton exported through Port Aransas to which we have referred, but they will be required to establish rates in accordance with the views herein expressed and also to observe the same practices in respect to through bills of lading on cotton via Port Aransas that they observe on like traffic via other ports.

In Galveston Commercial Association *vs.* A. T. & S. Fe Ry. Co. 25 I. C. C. Reps. 222, Nov. 12, 1912, the commission took occasion to say that it

> has no direct jurisdiction to compel the issue of through export bills of lading nor to prescribe the terms and conditions upon which they shall issue, since it has no jurisdiction over the water carriers. . . . . But we hold that to decline to issue bills of lading through Galveston, while issuing them through other ports would be an undue discrimination against Galveston, unless justified by difference in conditions at different ports which does not appear in this record.

In Chamber of Commerce of N. Y. *vs.* New York Central and Hudson River R. R. Co., 24 I. C. C. Reps. 74, June 4, 1912, the commission also stated that it has "no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways."

STATUTES REGULATING OR PROHIBITING COMBINATIONS, CONFERENCES OR AGREEMENTS

As was shown in the conclusive report of the House Committee on the Merchant Marine and Fisheries, the existence of steamship combinations, conferences or agreements is an almost universal condition. The committee has recommended that certain obnoxious practices, such as the granting of deferred rebates and the operation of fighting ships should be prohibited, but that steamship conferences and agreements should be subjected to federal regulation so as to avoid their evil results and retain their advantages. Such federal statutes as are at present applicable are based upon the policy of free competition, rather than coöperation, and their tendency is to prohibit and abolish rather than to regulate. The statutes referred to are the interstate commerce act as amended, the Sherman anti-trust law of 1890, and certain sections of the Wilson tariff act of 1894.

Provisions of Interstate Commerce Act.—Section 4 of the interstate commerce act as amended in 1910 aims to *safeguard water competition* by providing that: "Whenever the carrier by railroad shall, in competition with a water route or routes, reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions rather than the elimination of water competition." It is probable that this provision may prove valuable in the future development of the country's inland and coastwise waterways. Inland water transportation has in the past not infrequently suffered a decline as a result of temporarily low railroad rates.

Section 5 of the original interstate commerce act prohibits the *pooling of the freight or earnings of railroads* as follows:

> It shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement or combination with any other common carrier or carriers for the pooling of freights of this and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense.

It has been claimed that this anti-pooling clause applies to water carriers operating in connection with railroads, but the commission has denied that it is applicable to water carriers either in the domestic or foreign trade. Its ruling in Cosmopolitan Shipping Co. *vs.* Hamburg-American Packet Co., 13 I. C. C. Reps. 274, March 9, 1908, was as follows:

> The matter which is most prominently raised in the present complaint (the pooling of traffic by water carriers) is plainly one as to which the Commission has no jurisdiction for the Act prohibits pooling only as to "railroads." The pooling of ocean freights or of water freights of any character was evidently not in the mind of Congress when it adopted this provision. (Section 5.)

The Interstate Commerce Commission at present has no authority either to prohibit or regulate steamship lines in the matter of pooling their freight or receipts.

Provisions of Panama Canal Act.—A common form of combination in the coastwise and inland business is the *ownership or control of water carriers by interstate railroad companies.* In 1912 Congress amended section 5 of the interstate commerce act so that all such ownership or control of competing water carrier, or carriers which may be competitive shall, after July 1, 1914, be prohibited, unless the commission under certain conditions extends the time during which water carriers so owned or controlled may be operated. The prohibition, however, is practically complete because the commission is not empowered to grant such extension of time unless it decides that the service by water is "operated in the interest of the public and is of advantage to the convenience and commerce of the people *and* that such extension will neither exclude, prevent or reduce competition on the route by water under consideration." When this amendment was being considered in Congress an unsuccessful effort was made to substitute the word "or" for the word "and" in the preceding phrase. The addition which was made to section 5 of the interstate commerce act in section 11 of the Panama Canal act is as follows:

> From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indi-

rectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

As was more fully stated above on p. 34 such competitive or potentially competitive water carriers as may be owned or controlled by interstate railroads after July 1, 1914, by consent of the Interstate Commerce Commission are subjected to all the provisions of the interstate commerce act as regards their rates, schedules and practices both in their rail-water and their port-to-port business.

The amendment to the interstate commerce act above quoted also *prohibits any railroad-owned or controlled water carrier which is or may be competitive, from passing through the Panama Canal.* So far as Panama Canal navigation is concerned this prohibition is complete because in such cases the Interstate Commerce Commission is not under any circumstances authorized to extend the time of railroad ownership or control. It has not been decided whether this prohibition excludes all railroad-owned or controlled vessels from navigating the Panama Canal or only such water carriers as are or may be in competition with the railroads. Neither has it been decided whether this prohibition applies to steamship lines which are owned or controlled by the Canadian Pacific Railroad or other foreign railroad companies.

Section 11 of the Panama Canal act also amends section 5 of the interstate commerce act by *prohibiting any vessel which is owned, chartered, operated, or controlled by any concern which is doing business in violation of the Sherman anti-trust law of 1890, or the anti-trust sections of the Wilson tariff act of 1894 from navigating the Panama Canal.* The section provides that:

> No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated or controlled by any person or company which is doing a business in violation of the provisions of the Act of Congress, approved July 2d, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies." All the provisions of sections seventy-three to seventy-seven both inclusive of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation to provide revenue for the Government and for other purposes." Or the provisions of any other Act of Congress amending or supplementing said Act of July 2d, 1890, commonly known as the Sherman Anti-Trust Act and Amendments thereto, or said sections of the Act of August twenty-second, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any Court of the United States of competent jurisdiction, in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney-General of the United States.

Although it is provided that the question of fact is to be determined by any court of the United States of competent jurisdiction the strict enforcement of this section is of doubtful practicability. Its strict enforcement would require that all vessels owned, char-

tered, operated or controlled by illegal industrial combinations be denied the right of canal passage. It would also prevent the passage of vessels owned, chartered, operated or controlled by all those steamship concerns which are parties to any conferences, pools, agreements or understandings which the courts may declare to be illegal under the federal anti-trust laws. Should the courts declare the steamship conferences, etc., which now prevail so widely among the ocean carriers of the world, to be illegal combinations, relatively few vessels would under the above provision of the Panama Canal act be legally authorized to navigate the canal.

The Federal Anti-Trust Acts.—The statutes which are generally applicable to and which *prohibit all combinations, conferences or agreements which result in unreasonable restraint of interstate or foreign trade* are the Sherman anti-trust law of 1890 and certain provisions of the Wilson tariff act of 1894. The former statute declares to be unlawful

> Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states, or with foreign nations . . . . every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations . . . . every contract, combination in form of trust or otherwise or conspiracy in restraint of trade or commerce in any territory of the United States or the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states, or the District of Columbia, or with foreign nations or between the District of Columbia and any state or states or foreign nations. . . . .

Section 73 of the tariff act of 1894 which remains in effect, declares:

> that every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal and void when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade or free competition in lawful trade or commerce or to increase a market price in any part of the United States of any article or articles imported or intended to be imported into the United States or of any manufacture into which such imported article enters or is intended to enter.

The common belief that the Sherman anti-trust act applied only to industrial combinations was definitely abandoned in 1897–98 when in U. S. *vs.* Trans-Missouri Freight Association, 166 U. S. 290 and U. S. *vs.* Joint Traffic Association, 171 U. S. 505, the United States Supreme Court decided that "the language of the act includes every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations." This construction of the act still holds except that, since the decisions in the Standard Oil and the American Tobacco cases, the word "unreasonable" has been inserted.

Application of Federal Anti-Trust Acts by the Courts.—There have been no instances in which the Sherman anti-trust act has been specifically applied to the usual type of combination, conference or agreement among water carriers by the Supreme Court, although various cases are at present being urged by the government. (U. S. *vs.* Hamburg-American Packet Co. et al.; U. S. *vs.* American-Asiatic Steamship Co. et al.; U. S. *vs.* Prince Line Ltd. et al.). The Supreme Court has, however, in a decision involving an agreement between several steamship companies and the Canadian Pacific Railroad to suppress competition in the Alaskan trade by refusing to establish through routes, joint rates and through bills of lading over independent outside steamship lines, definitely applied the Sherman anti-trust law to rail and water carriers operating in American territory, even though they may be foreign corporations. In the decision referred to—U. S. *vs.* Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaskan Steamship Company and Canadian Pacific Railway Company, 228 U. S. 87, April 7, 1913—the Supreme Court decided as stated in the syllabus:

> That while under the Interstate Commerce Act a carrier may select its through route connections, agreements for such connections may constitute violations of the Anti-Trust Act if made not for natural trade reasons or on account of efficiency but as a combination and conspiracy in restraint of interstate trade and for the purpose of obtaining a monopoly of traffic by refusing to establish routes with independent connecting carriers. . . . . A combination made in the United States between carriers to monopolize certain transportation partly within and partly without the United States is within the prohibition of the Anti-Trust Act and is also within the jurisdiction of the criminal and civil law of the United States even if one of the parties combin-

ing be a foreign corporation. . . . . While the United States may not control foreign citizens operating in foreign territory it may control them when operating in the United States in the same manner as it may control citizens of this country.

The lower federal courts have at various times applied the Sherman anti-trust act to water carriers. The circuit court in United States *vs.* Hamburg-American Packet Company, et al., 200 Federal Rep. 806, Dec. 20, 1911, declared the division of steerage traffic into percentages and the pooling of receipts derived therefrom to be illegal. and took occasion to say that the act applies regardless of whether the parties to the combination are citizens or corporations of the United States or of foreign countries, whether the vessels used are of American or foreign registry, and whether the illegal restraint is practiced in domestic or foreign commerce. The decision of the court, which has been appealed to the Supreme Court of the United States, contains the following observations regarding the application of the federal anti-trust act to water carriers:

It may be accepted without discussion that the transportation of passengers between this country and Europe forms a part of the commerce of the United States to foreign nations. It is also clearly established that Congress has power to prohibit all contracts, combinations and conspiracies in restraint of such part of the foreign commerce of the United States. . . . . The prohibitions of the Anti-Trust Act apply broadly to contracts in restraint of trade or commerce with foreign nations. . . . . We see nothing to warrant the contention that the Acts should be narrowly interpreted as prohibiting only contracts which are to be performed wholly within the territorial jurisdiction of the United States nor—if it were for us to consider—any reason for concluding that the broader construction would lead to international complications. . . . . As the contract directly and materially affects the foreign commerce of the country by being put into effect here, it is immaterial where it was entered into or by what vessels it was to be or has been formed. Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purposes. . . . . Whether or not the statute is directed against all combinations in restraint of competition it is certain that it embraces those in which the purpose and effect are to charge arbitrary and excessive transportation rates. Whether the statute be broadly or narrowly constructed it is clear that it prohibits combinations and conspiracies to restrain the business of transporting passengers when accompanied with acts of oppression and attempts to monopolize.

In Thomsen et al. *vs.* Union Castle Mail Steamship Company et al., 166 Federal Rep. 251, Oct. 1, 1908, the Circuit Court of Appeals

in considering the deferred rebates which enabled the so-called "South African Lines" conference to fix ocean rates and suppress outside competition, likewise, took occasion to say "that the combination was formed in a foreign country is immaterial. It affected the foreign commerce of this country and was put into operation here;" and that Thomsen et al. are entitled to "their full day in court" to try and collect treble damages. Since the application of the rule of reason by the Supreme Court, a new trial has been ordered in this case but the statement of the Circuit Court of Appeals with reference to the application of the anti-trust act to illegal combinations formed in foreign countries has thus far not been altered.

In Cole Transportation Company *vs.* White Star Line, 186 Fed. Rep. 63, March 7, 1911, the Circuit Court of Appeals in considering the lease of a vessel by one Great Lakes carrier to another and an agreement by one of the carriers not to engage in competition during a term of three years, declared the lease to be void, and in violation of the Sherman anti-trust act. In United States *vs.* Great Lakes Towing Co. et al., 208 Federal Reporter 733, Feb. 11, 1913, the United States District Court decided that this consolidation had been formed to secure a monopoly and combination in unreasonable restraint of interstate and foreign commerce and violates the Sherman anti-trust act.

Sufficient decisions have been rendered by the federal courts to indicate that the anti-trust laws apply to all consolidations, agreements, contracts, conferences or arrangements between carriers by water which unreasonably restrain interstate or foreign trade. The pending cases above mentioned, particularly the Supreme Court case of United States *vs.* Hamburg-American Packet Company et al., will, however, indicate more clearly whether the courts regard the typical ocean conferences and agreements, which so generally prevail, as monopolies or combinations in "unreasonable" restraint of trade.

SHORTCOMINGS AND FALLACIES OF PRESENT STATUTES

Having outlined the various ways in which water transportation is subject to government control, it is obvious that while many phases are covered by existing statutes many others are at present unregulated. It has, moreover, been suggested that some of the

statutes now applicable may in the near future require modification so as to deal fully and wisely with practical transportation conditions and practices.

In the domestic trade the interstate charges and public services of carriers by water are not regulated in their port-to-port business. Those of water carriers which handle only port-to-port traffic are subject to no government regulation, and those of carriers by water which handle traffic in connection with railroads are regulated only in so far as they concern traffic handled partly by rail and partly by water. As regards their interstate port-to-port business the Interstate Commerce Commission has no authority to require the filing of rate tariffs, to determine maximum charges and classification, or to prevent discriminations between shippers or places as regards rates, fares, demurrage, storage, and other charges, deferred rebates, the settlement of claims, loading and discharging cargo, bills of lading, transfer and lighterage, terminal or other facilities, regulations or practices. The interstate commerce act likewise does not apply to the interstate port-to-port traffic of canals.

Although the commission has the power to establish a uniform accounting system and require statistical reports covering the port-to-port business of carriers by water who handle interstate traffic in connection with railroads, it has no authority over the accounts of carriers by water who conduct only a port-to-port business. It can not require them to submit statistical reports and cannot investigate their financial and business operations.

The application of the interstate commerce act to the interstate freight traffic of carriers by water which is handled partly by rail and partly by water has gradually been increased in the amendments of 1906, 1910 and 1912, and the charges and public services in case of such traffic can be effectively controlled whenever the commission sees fit to exercise its full authority. However, as regards the passenger traffic handled over rail-water routes, though sections 1 and 15 of the act to regulate commerce include both the passenger and freight traffic, the important amendments to section 6 contained in the Panama Canal act of 1912 refer only to the transportation of "property." There are no convincing reasons why the provisions of this amendment should not be equally applicable whether the rail-water service concerns freight or passenger traffic.

It has also been recommended by the House Committee of

the Merchant Marine and Fisheries "that the railroads be prohibited from making the through rail and water route unprofitable as compared with the all-rail route, by charging more for the same service on water-borne commodities than they charge for a proportionate share of the all-rail haul." As the interstate commerce act now stands the commission has the power to regulate both the rail and water portion of a rate in case of a through rail and water route, and could, if it desired, prevent the situation referred to by the committee. The commission, as in New York Produce Exchange *vs.* New York Central & Hudson River Railroad Co., et al., and Chicago Board of Trade *vs.* Atlantic City Railroad Co. et al., 20 I. C. C. Reps. 504, April 4, 1911, has refused to require the railroads carrying ex-Lake grain from Buffalo to charge less than the local rail rate. The recommendation of the committee aims to prohibit the situation referred to rather than to depend upon the Interstate Commerce Commission for an exercise of its powers.

Although the Interstate Commerce Commission has on various occasions exercised its power in the following matters, the Committee on the Merchant Marine and Fisheries, in order to avoid all possible ambiguity and doubt, recommends that

> the rate divisions on any trade route should be open equally to all water carriers that comply with such conditions of quality and regularity of service as the commission may determine to be reasonable . . . . that the railroads and water carriers be required to issue through bills of lading to all interstate water carriers that meet such conditions of quality and regularity of service as the Interstate Commerce Commission may consider reasonable . . . . and that railroads be required to account separately to the Interstate Commerce Commission for the income and expenditures of interstate water lines owned or controlled by them.

The ownership or control of water carriers by railroads is fully covered by the Panama Canal act. The reading of section 11 indicates, however, that it is in some respects ambiguous. It moreover raises the question of whether it is desirable to treat railroad-owned or controlled vessels differently in the handling of Panama Canal traffic than in other branches of the coastwise business.

In the foreign trade with over-sea countries government control over the charges and public services of ocean carriers is far less extensive than in the domestic business. The Interstate Commerce Commission has no jurisdiction over their charges or public services

in the port-to-port business and none over their rail-water business other than such indirect control as is exercised by regulating the rates, bills of lading and other arrangements of connecting railroads. The commission has no authority over the maximum rates, fares or other charges or over the contracts or other conditions of ocean carriers affecting the interests of shippers or passengers, other than over the transportation of explosives. It has no power to prohibit the payment of deferred rebates or to prevent unfair discriminations in charges, accommodations, cargo space and other facilities, in the settlement of claims, or in other services and practices.

Conferences, agreements, traffic associations, pools or other arrangements and understandings between carriers by water both in the interstate and foreign trade are, whenever they unreasonably restrain trade, prohibited by the Sherman anti-trust act and the anti-trust sections of the Wilson tariff act. Yet the existence of steamship conferences, agreements, etc., is an almost universal condition and the wisdom of abolishing rather than regulating them has frequently been questioned. Vessels owned, chartered, controlled, or operated by concerns which do business in violation of these acts, are moreover barred from the Panama Canal, although the desirability and practicability of employing the canal as a means of enforcing the country's anti-trust laws has not been established.

The House Committee on the Merchant Marine and Fisheries has recommended the prohibition of objectionable features such as the use of "fighting ships" or retaliatory and unfair methods against independent shippers or carriers by water, and the payment of deferred rebates. It has recommended that, as in the case of railroads, carriers by water, "if cutting rates with a view to driving out a competitor, should be denied the privilege of restoring rates, and jurisdiction should be conferred on the Interstate Commerce Commission to determine whether rates are cut with the object of crushing such competition." It has also recommended however, that any conferences, agreements, etc., whether between carriers by water or between such carriers and shippers, railroads, or other transportation agencies, which are not discriminating or unfair in character shall be retained. In order to protect the interest of all parties concerned the committee recommends that all conferences, agreements, etc., shall be filed with the Interstate Commerce Commission and that the commission shall have the power to cancel or reject them or any parts thereof which are "discriminating or unfair in character or detrimental to the commercial interests of the United States."